RHB Finance Bhd v CN Corporate Network (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-140 OF 1998
KAMALANATHAN RATNAM J
24 JANUARY 2000

Legal Profession *— Practice of law — Effect of Practice and Etiquette Rules — Opposing solicitors on record — Default judgment obtained without giving written notice pursuant to r 56 — Whether court could take into account breach of Practice and Etiquette Rules — Practice and Etiquette Rules 1978 r 56*

Civil Procedure *— Setting aside — Default judgment — Opposing solicitor on record — Whether written notice had to be given before obtaining default judgement — Practice and Etiquette Rules 1978 r 56*

The plaintiff sued six defendants and served the writ of summons and statement of claim on the first, second and third defendants who entered appearance on 9 April 1998. On 27 November 1998, the solicitors for the defendants obtained a discharge but the said fair order was only filed on 4 January 1999. When both counsels appeared on 5 January 1999 for case management, counsel for the defendants confirmed that he was still on record as the fair order had not as yet been extracted from the registry. The court then fixed 3 February 1999 for case management but it was postponed to 22 February 1999 as the judge was on leave. The court then informed the plaintiff's solicitors and the defendants by a letter dated 11 February 1999 to attend on 22 February 1999. However the plaintiff obtained judgment in default of defence on 4 February 1999. The defendants applied to set aside the in default judgment and the senior assistant registrar allowed the application and gave the defendants 14 days to file the defence. The plaintiff appealed. When asked by the judge if the plaintiff had given the statutory notice before obtaining judgment, counsel for the plaintiff admitted that he had only given an oral notice.

Held, dismissing the appeal with no order as to costs:

(1) The plaintiff's solicitors were under a duty to give the usual statutory notice pursuant to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 to the defendants' solicitors as they were still on record because when both counsel appeared before the court on 5 January 1999, the fair order in respect of the discharge had not been extracted (see p 689F–G).

(2) While sub-s (3) of s 77 of the Legal Profession Act 1976 provided for the possibility of disciplinary proceedings against an advocate and solicitor for breaching a rule, any breach of any rule ought to be considered by the court for its relevancy. This is because the true purport and effect of introducing this rule is to show to practising lawyers that they cannot obtain a default judgment unless they have complied with the provisions of the rule. Any breach of r 56 therefore must of necessity entitle the defendant, if

A he can successfully show the breach, to set aside the judgment obtained in default (see p 690C–E).

(3) Once an advocate and solicitor has been shown to have breached r 56, then notwithstanding the fact that he has not breached any of the rules of the Rules of the High Court 1980 ('the RHC'), the court is always empowered under its inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court by virtue of O 92 r 4 of the RHC (see p 690F–G); *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 not followed.

C

[Bahasa Malaysia summary

Plaintif telah mendakwa enam defendan dan menyampaikan writ saman dan pernyataan tuntutan kepada defendan pertama, kedua dan ketiga yang memasukkan kehadiran pada 9 April 1998. Pada 27 November 1998, peguamcara defendan-defendan telah mendapatkan suatu pelepasan daripada guaman tersebut (discharge) tetapi perintah yang tidak disempurnakan hanya difailkan pada 4 Januari 1999. Apabila kedua-dua peguam hadir pada 5 Januari 1999 untuk pengurusan kes, peguam defendan memastikan bahawa beliau masih tercatat atas rekod kerana perintah fair order masih belum dikeluarkan daripada daftar. Mahkamah kemudiannya menetapkan 3 Februari 1999 untuk pengurusan kes tetapi ini ditangguhkan kepada 22 Februari 1999 kerana hakim tidak hadir. Mahkamah kemudiannya memberitahu peguamcara plaintif dan defendan melalui surat bertarikh 11 Februari 1999 supaya hadir pada 22 Februari 1999. Walau bagaimanapun, plaintif telah memperolehi penghakiman ingkar pembelaan pada 4 Februari 1999. Defendan-defendan telah membuat permohonan untuk mengetepikan penghakiman ingkar tersebut dan penolong kanan pendaftar telah membenarkan permohonan tersebut dan memberi defendan-defendan 14 hari untuk memfailkan pembelaan. Plaintif merayu. Apabila ditanya oleh hakim sama ada plaintif telah memberikan notis berkanun sebelum memperolehi penghakiman, peguam plaintif mengaku bahawa beliau cuma telah memberi notis lisan.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Peguamcara plaintif wajib memberi notis berkanun yang biasa menurut k 56 Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 kepada peguamcara defendan memandangkan mereka masih tercatat dalam rekod kerana apabila kedua-dua peguam hadir di mahkamah pada 5 Januari 1999, perintah yang tidak disempurnakan berhubung dengan pelepasan tersebut belum lagi dikeluarkan (lihat ms 689F–G).

(2) Sedangkan s 77(3) Akta Profesyen Undang-Undang 1976 mempunyai peruntukan bagi kemungkinan prosiding tatatertib terhadap seseorang peguambela dan peguamcara sekiranya

melanggar mana-mana kaedah, sebarang pelanggaran kaedah sepatutnya dipertimbangkan oleh mahkamah atas kerelevanan. Ini adalah kerana tujuan dan kesan sebenar kaedah ini diperkenalkan adalah untuk menunjukkan kepada peguam yang terlatih bahawa mereka tidak boleh memperolehi penghakiman ingkar melainkan mereka telah mematuhi peruntukan kaedah tersebut. Dengan itu, sebarang pelanggaran k 56 mestilah secara perlu memberi hak kepada defendan, sekiranya ia berjaya menunjukkan kemungkiran, untuk mengetepikan penghakiman yang diperolehi atas keingkaran (lihat ms 690C–E).

(3) Sebaik saja seseorang peguambela dan peguamcara terbukti telah memungkiri k 56, maka tanpa mengira hakikat bahawa beliau tidak memungkiri mana-mana kaedah dalam Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah sentiasa berkuasa di bawah kuasa sedia ada untuk membuat sebarang perintah seperti yang perlu untuk mengelak ketidakadilan atau untuk menghalang penyalahgunaan proses mahkamah di bawah A 92 k 4 KMT (lihat ms 690F–G); *Asia Commercial Finance (M) Bhd v Bank Bumiputra (M) Bhd & Ors* [1988] 1 MLJ 33 tidak diikut.]

Notes

For cases on Practice and Etiquette Rules, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1597–1602.

For cases on practice and etiquette, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1501–1508.

For cases on default judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2748–2749.

Cases referred to

Asia Commercial Finance (M) Bhd v Bank Bumiputra (M) Bhd & Ors [1988] 1 MLJ 33 (not folld)

Legislation referred to

Legal Profession Act 1976 s 77
Legal Profession (Practice and Etiquette) Rules 1978 r 56
Rules of the High Court 1980 O 2 r 1, O 92 r 4

MJ Yap (*Chung Kuang & Khalid*) for the appellant/plaintiff.

Kushwant Singh (*Norendra & Yap*) for the first, second and third respondents/defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff sued six defendants. It is not necessary to go into the causes of action for the purpose of this application. This matter relates to only the

first, second and third defendants. The writ of summons and statement of claim were served on the first defendant on 27 March 1998, on the second defendant on 3 April 1998 and on the third defendant on 1 April 1998. All three defendants ('the defendants') were represented by solicitors who entered appearance for them on 9 April 1998. The affidavit of service in respect of the defendants was filed on 13 May 1998 but it is to be noted that there is no date to show when it was in fact affirmed. On 27 November 1998, the solicitors for the defendants obtained a discharge but the said fair order was only filed on 4 January 1999. The case was fixed for case management on 5 January 1999 when both counsel appeared. Mr Guna appearing for the defendants, confirmed that he was still on record as the fair order had not as yet been extracted from the registry. The court then fixed 3 February 1999 for case management. In the meantime, this court had sent out a notice to both solicitors on 26 January 1999 informing them that the case management fixed for 3 February 1999 had been postponed to 22 February 1999 as I was on leave. This court then by a letter dated 11 February 1999 informed the plaintiff's solicitors and the defendants to attend on 22 February 1999. However the plaintiff had obtained judgment in default of defence on 4 February 1999. The defendants applied to set aside the in default judgment. The learned senior assistant registrar allowed the application and gave the defendants 14 days to file the defence. This is the plaintiff's appeal against that decision.

Findings of the court

If the court had proceeded with the case management on 3 February 1999, certainly the plaintiff would not have been able to obtain judgment in default of defence since the defendants' counsel would have been present or at least the defendants would have been present. Since there is no evidence before me as to when the fair order in respect of the discharge of the defendants' former solicitors was extracted and served on the plaintiff's solicitors and since as at 5 January 1999 when both counsel appeared before me, the fair order in respect of the discharge had not been extracted, I was of the view that as the defendants' solicitors were still on record it was the duty of the plaintiff's solicitors to have given the usual statutory notice pursuant to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The said rule reads as follows:

> Judgment by default
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> Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-name advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

These rules are made pursuant to s 77 of the Legal Profession Act 1976. The said section reads as follows:

Power to make rules regulating practice, etc

(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(2) Any rules made pursuant to this section shall not come into operation until they have been published in the Gazette.

(3) Any advocate and solicitor who fails to comply with any rules made under this section may be liable to disciplinary proceedings.

(4) The Attorney General may, by order published in the Gazette, make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

Whilst sub-s (3) of s 77 provides for the possibility of disciplinary proceedings against the advocate and solicitor breaching a rule I am of the view that any breach of any rule ought to be considered by the court for its relevancy. What is the purpose of r 56. Surely it does not mean that if a solicitor deliberately flouts it by failing to give the notice all he can be liable for is a possible disciplinary proceeding against him. I am of the view that the true purport and effect of introducing this rule is to show to practising lawyers that they cannot take in default judgment unless they comply with the provisions of the rule. Any breach of r 56 therefore must of necessity entitle the defendant, if he can successfully show the breach, to set aside the judgment obtained in default.

When I asked counsel for the plaintiff if he had given the statutory notice he frankly admitted that he had only given oral notice. Even assuming that he did give oral notice, that is insufficient. The rule requires a written notice to be given.

I am aware of the decision in *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33, where the court held that non-compliance with r 56 does not render the judgment in default of defence irregular. The learned judge went on to hold that under O 2 r 1 of the Rules of the High Court 1980 ('the RHC'), only failure to comply with the RHC should be treated as an irregularity. It is my judgment that once an advocate and solicitor has been shown to have breached r 56 then notwithstanding the fact that he has not breached any of the rules of the RHC, the court is always empowered under its inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court (see O 92 r 4 of the RHC). Since the plaintiff's solicitors have confirmed that no notice pursuant to r 56 has been given to the plaintiff, I dismissed the appeal. In the exercise of my discretion, I felt that this was not a proper case to grant the successful defendants their costs. There was therefore no order for costs.

Appeal dismissed.

Reported by Chin En Tek